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No.

In the

Supreme Court of the United States

ERIC RODRIGUEZ, MARTIN MALAVE-DILAN, HOWARD T. ALLEN, JEANNETTE SANTOS, DONALD J. JIRAK, RICHARD FLATEAU, CHARLOTTE A. TAYLOR, MERVYN A. CAMPBELL, SARAH BROCKUS, PATRICIA McDOW, LISA BEST, VICTOR OLUWOLE, RUBEN RANGEL, RUSSELL VELAZQUEZ, GUILLERMO LINARES, ISABEL EVANGELISTA, MARTHA PEPIN, MARISEFA REYES, MARIA URENA, TYRONE ZIMMERMAN, JOSE ALVARADO, IRVIN R. McMANUS, WAYNE HALL, SAMUEL PRIOLEAU, WILLIAM RODRIGUEZ, NEVILLE MULLINGS, MARY ADAMS, EUGENE A. BURNETT, HAZEL PALMORE, and JOHNNY VELEZ,

Appellants,

– against –

GEORGE E. PATAKI, Governor of the State of New York,

(For Continuation of Caption See Reverse Side of Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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MARY O. DONOHUE, Lt. Governor and President of the Senate of the State of New York, ELIOT SPITZER, Attorney General of the State of New York, JOSEPH L. BRUNO, President *Pro Tempore* and Majority Leader of the Senate of the State of New York, SHELDON SILVER, Speaker of the Assembly of the State of New York, DAVID A. PATERSON, Minority Leader of the Senate of the State of New York, CHARLES NESBITT, Minority Leader of the Assembly of the State of New York, and CAROL BERMAN, NEIL W. KELLEHER, HELENA M. DONOHUE, and EVELYN J. AQUILA, Commissioners of the New York State Board of Elections,

Appellees.

QUESTIONS PRESENTED

The district court granted summary judgment upholding New York's 2002 Senate redistricting plan, which has a total population deviation of 9.78%, despite overwhelming and uncontradicted evidence that the plan's deviations resulted from the Legislature's deliberate effort to subordinate the goal of population equality to the pursuit of regional and partisan advantage. This appeal presents the following questions:

1. Did the district court err in holding that because the plan's total population deviation is less than ten percent, Plaintiffs could not prevail on their population equality claim without demonstrating that the deviation resulted "solely" from the Legislature's pursuit of illegitimate objectives?

2. Is the pursuit of partisan advantage a legitimate reason for a legislature to purposefully deviate from population equality?

3. Is the desire to preserve the status quo a legitimate reason for a legislature to refrain from drawing districts that reflect population shifts recorded by the most recent decennial Census?

4. Did the district court err in granting summary judgment in the face of overwhelming and uncontradicted record evidence of regional discrimination?

5. Does the federal common law recognize a "legislative privilege" that insulates a legislator and his aide from complying with discovery regarding their construction of a redistricting plan, even where the legislator has voluntarily asserted himself as "lead defendant" and designated the aide to serve as his expert witness?

PARTIES

Plaintiffs-Appellants filing this Jurisdictional Statement are: Eric Rodriguez, Martin Malave-Dilan, Howard T. Allen, Jeannette Santos, Donald J. Jirak, Richard Flateau, Charlotte A. Taylor, Mervyn A. Campbell, Sarah Brockus, Patricia McDow, Lisa Best, Victor Oluwole, Ruben Rangel, Russell Velazquez, Guillermo Linares, Isabel Evangelista, Martha Pepin, Marisefa Reyes, Maria Urena, Tyrone Zimmerman, Jose Alvarado, Irvin R. McManus, Wayne Hall, Samuel Prioleau, William Rodriguez, Neville Mullings, Mary Adams, Eugene A. Burnett, Hazel Palmore, and Johnny Velez.

Defendants-Appellees are George E. Pataki, Governor of the State of New York, Mary O. Donohue, Lt. Governor and President of the Senate of the State of New York, Eliot Spitzer, Attorney General of the State of New York, Joseph L. Bruno, President Pro Tempore and Majority Leader of the Senate of the State of New York, Sheldon Silver, Speaker of the Assembly of the State of New York, David A. Paterson, Minority Leader of the Senate of the State of New York, Charles Nesbitt, Minority Leader of the Assembly of the State of New York, and Carol Berman, Neil W. Kelleher, Helena M. Donohue, and Evelyn J. Aquila, Commissioners of the New York State Board of Elections.

Plaintiff-Intervenors below, who are not parties to this appeal, were the Latino Voting Rights Committee of Metro New York, Mayra Cappas, Raquel Emilia Batista, Jose Dominguez, Alice Cardona, Genaro Herrera, David Galarza, the Latino Voting Rights Committee of Suffolk County, Joseph Lopez, Enrique Gomez, Peter K. Lau, John Kuo Wei Tchen, Mindy Kim, Sachi Dastidar, Tara Singh, Sandra Rivers, Rosemari Mealy, Ronald Cranshaw, Sandra Bradford, Leslie Barbour, Michelle Romero, William O. Low, Cecilia Guiterrez, Evelyn Miller, Seretta C. Mcknight, Tracey Edwards, Donna Swain, Ann Jones, the New York State Council of Black Elected Democrats, Cherry Weinstein, Lynn Elfe, David Gantt, William Johnson, Wade Norwood, Ronnie Thomas, Arthur O. Eve,

Charles H. Fisher III, James W. Pitts, Beverly Gray, George A. Holt, Jr., and Louise Slaughter.

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OPINIONS BELOW

The district court's opinion granting Defendants summary judgment is reported at 308 F. Supp. 2d 346 (S.D.N.Y. 2004), and is reproduced at 1a. The orders of the magistrate judge relating to the Senate Majority Leader's assertion of "legislative privilege," together with the district court's affirmances thereof, are reproduced at 183a.

JURISDICTION

This is an appeal from the March 19, 2004 final judgment of a three-judge court of the United States District Court for the Southern District of New York. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 1253 and 2101(b). Pursuant to Rule 18(3) of this Court, Justice Ginsburg granted Plaintiffs' application for an extension for filing this Jurisdictional Statement through and including August 12, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of Section 1 of the Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Rule 501 of the Federal Rules of Evidence provides: "[T]he privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

STATEMENT OF THE CASE

This appeal presents several pressing issues that were left unresolved by this Court's summary affirmance in *Cox v. Larios*, 124 S. Ct. 2806 (2004), including: the nature of a plaintiff's burden in a population inequality claim where the total deviation in a legislative redistricting plan is below ten percent, the types of objectives that legislatures may legitimately pursue when purposefully departing from population equality, and the extent of a legislature's obligation to comply with discovery relating to whether it engaged in the "honest and good faith effort" to draw districts of equal size that is required by *Reynolds v. Sims*, 377 U.S. 533 (1964), and its progeny. These issues have assumed heightened significance in the wake of *Larios*, which settled that a redistricting plan with a total population deviation below ten percent is not *per se* immune from constitutional scrutiny. *See Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring); *id.* at 2809-10 (Scalia, J., dissenting).

Plaintiffs claim that New York's most recent redistricting of its Senate districts (the "2002 Senate Plan" or the "Plan") violates the equal representation principle to which this Court has adhered since *Reynolds*. As in *Reynolds* and *Larios*, the 2002 Senate Plan evidences a stark, methodical pattern of geographic discrimination in favor of one region of the State and against another. Every single Senate district in upstate New York is substantially underpopulated, and every single downstate district is substantially overpopulated, with a total population deviation of 9.78%. The record contains overwhelming evidence, both circumstantial and direct, confirming—or at least establishing a prima facie case—that this was no accident, but rather resulted from the Legislature's deliberate effort to maintain the existing number of upstate Senate districts in the face of the substantial downstate population shift revealed by the 2000 Census.

The district court granted Defendants summary judgment, holding that because the Plan's total population deviation is below ten percent, Plaintiffs were required to demonstrate that

the deviation resulted "solely" from impermissible redistricting considerations. (J.S. 24a, 25a-26a). The court concluded that Plaintiffs could not satisfy this standard as a matter of law, finding that Plaintiffs' evidence failed to rule out the possibility that the Plan's stark pattern of regional discrimination was motivated by the desire to achieve partisan advantage, which the court apparently viewed as a legitimate state interest. *Id.* 2a, 4a, 30a. The court also found that the population disparities promoted the supposedly legitimate state interests of preserving existing districts and avoiding incumbent pairings. *Id.* 3a, 28a, 34a. The district court's decision is erroneous in numerous respects.

To begin with, the district court applied the wrong legal standard. Nothing in this Court's jurisprudence supports the novel proposition that a population inequality claimant must demonstrate that a plan's deviations were caused "solely" by impermissible redistricting considerations. Much to the contrary, this Court has repeatedly reaffirmed that redistricting plans must be "free from *any taint* of arbitrariness or discrimination." *Roman v. Sincock*, 377 U.S. 695, 710 (1964) (emphasis supplied). The district court's "solely" standard, which is as a practical matter impossible to meet, effectively resurrects the ten percent "safe harbor" that *Larios* squarely rejected.

The district court also erred in holding that purposeful regional discrimination can be justified by partisanship. This view is based on a false premise: that evidence of partisan motivation can prove absence of discrimination based on population in the same way that, in a claim brought under *Shaw v. Reno*, 509 U.S. 630 (1993), evidence of partisan motivation can prove absence of discrimination based on race. In the *Shaw* context, however, evidence of partisan motivation is proffered as an *alternative explanation* to purposeful discrimination: "We didn't discriminate on the basis of race; rather, we drew the lines because of politics." Here, in contrast, the district court recognized partisan motivation as a *justification* for purposeful discrimination: "We intentionally

deviated from population equality, but we did it because of politics." This Court has never held that the desire to gain partisan advantage justifies deliberately deviating from population equality. To the contrary, "the equal-population principle remains the only clear limitation" on the ability of legislatures to engage in partisan gerrymandering. *Larios*, 124 S. Ct. at 2808 (Stevens, J., concurring); *accord Reynolds*, 377 U.S. at 578-79 (recognizing that judicial enforcement of equal representation duty counteracts "partisan gerrymandering").

The district court further erred by ignoring the fact that the Legislature did not apply its supposedly "legitimate" redistricting considerations *evenhandedly*. *See Brown v. Thomson*, 462 U.S. 835, 843, 845-46 (1983) (requiring "consistency of application" and "neutrality of effect" in applying nonpopulation redistricting criteria); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983) (only "consistently applied" legislative policies can justify deviating from population equality). The court concluded, for example, that it was permissible to avoid pairing incumbents without considering the fact that the Legislature sought to protect *upstate* incumbents but gratuitously paired four downstate incumbent Democrats.

Nor did the district court consider whether the State's asserted interest in preserving the status quo can justify a deliberate failure to implement the Census, particularly on such a broad scale as in this case. Preserving districts is not one of the traditional redistricting criteria recognized by the New York Constitution, *see* N.Y. CONST. art. III, § 4, and that goal is fundamentally at odds with the overarching requirement of the Equal Protection Clause that redistricting plans must strive to reflect population shifts revealed in the most recent Census.

Finally, the district court erred in ruling that the Senate Majority Leader is protected by a federal common law "legislative privilege" that purportedly insulates him from discovery into why the Plan contains a discriminatory pattern of population deviations. (J.S. 183a). Even assuming that some type of qualified privilege exists – a dubious proposition – any asserted interest in legislative secrecy is outweighed in this case

by Plaintiffs' countervailing need to discover whether the Legislature discharged its solemn constitutional obligation to make a good faith effort to construct districts of equal size. In any event, the Senate Majority Leader waived whatever privilege otherwise might have applied by voluntarily asserting himself as "lead defendant" and by presenting as an expert witness an aide who served as the principal drafter of the Plan.

Despite the district court's erroneous privilege rulings, Plaintiffs were able to adduce considerable direct evidence confirming—or at a bare minimum enabling a reasonable factfinder to conclude—that the 2002 Senate Plan was not the result of an "honest and good faith effort" to achieve population equality. To the contrary, the record demonstrates convincingly that the drafters of the Plan deliberately subordinated population equality considerations to their paramount objective of manipulating population disparities to achieve as much regional and partisan advantage as they believed they could get away with.

FACTUAL AND PROCEDURAL BACKGROUND

The United States Census Bureau released the official results of the 2000 Census in March 2001. The Census data revealed that New York's population increased by almost one million during the 1990s. More than 76% of the State's overall growth occurred in New York City and its northern suburbs. (J.S. 268a). In the areas north and west of Albany, population actually fell between 1990 and 2000. *Id.* 249a. Because of this significant shift, the then-existing Senate districts (which had been drawn in 1992 following the 1990 Census) had a total population deviation far in excess of ten percent and were presumptively unconstitutional.

Indeed, the growth in population of the downstate region of the State relative to the upstate region was large enough to warrant shifting an entire Senate district from the upstate region to the downstate region. As of 2001, the then-existing

downstate Senate districts were overpopulated by 362,279 (enough population to constitute 1.16 ideally sized districts), and the upstate districts were underpopulated by 311,089 (enough population to constitute 1.02 ideally sized districts). (J.S. 238a-239a).

By January 2002 – ten months after the official 2000 Census data were released – the New York Legislature had made little public progress reapportioning its Senate districts. Plaintiffs therefore filed parallel lawsuits in state court and in federal district court seeking to compel the Legislature to redraw its Senate (and Assembly and Congressional) districts in conformance with the requirements of the Equal Protection Clause.

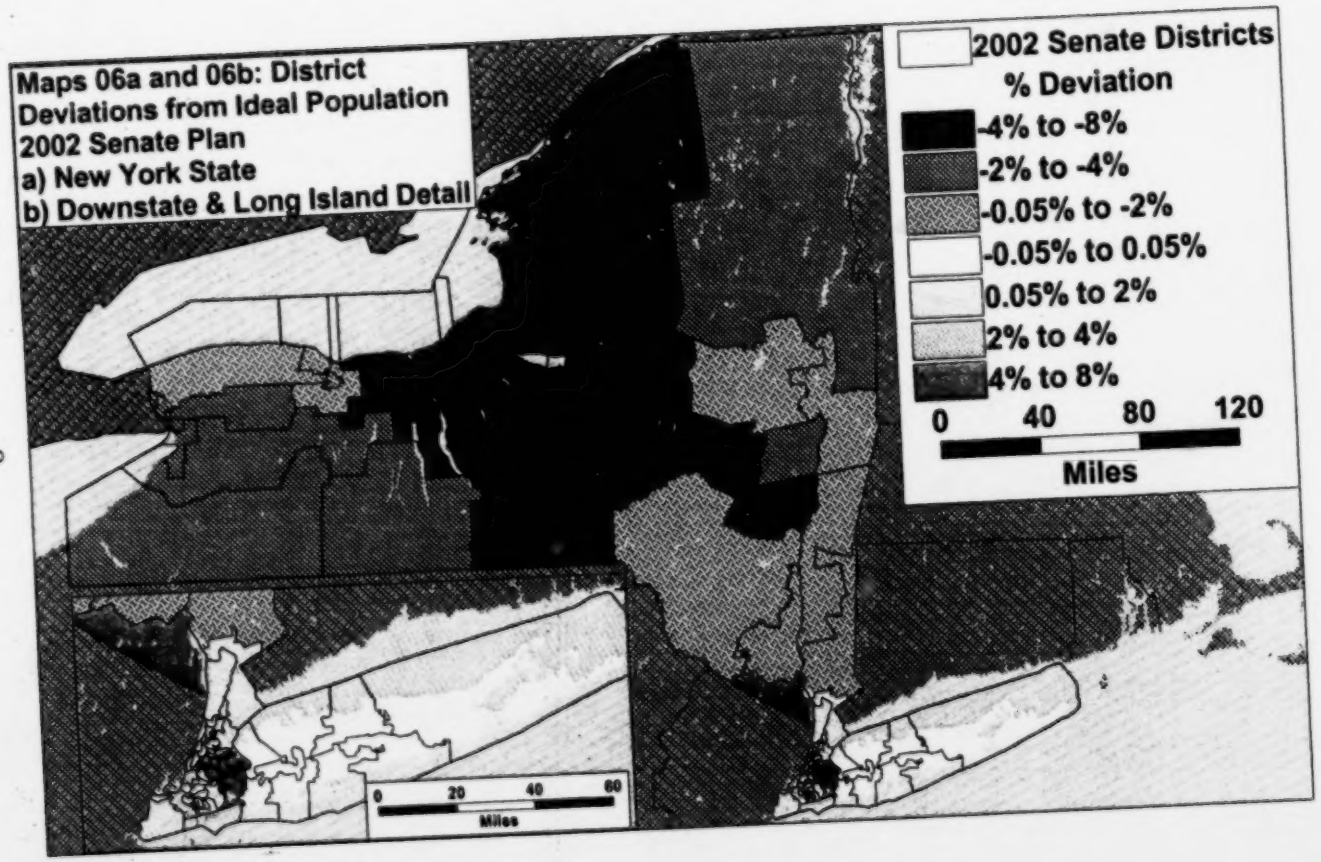
Meanwhile, the Legislature began the process of devising a plan for reapportioning its Senate districts in light of the 2000 Census. Under New York law, the New York State Legislative Task Force on Demographic Research and Reapportionment ("LATFOR") – a committee appointed by the legislative leadership consisting of both legislators and non-legislators – is charged with the task of developing redistricting plans and making redistricting recommendations to the Legislature. *See* N.Y. LEGIS. LAW § 83-m. In or about August 2001, LATFOR posted a notice on its website stating that the average Senate District population "will increase" to 311,089 – the figure for a 61-seat Senate. Throughout late 2001 and early 2002, a number of groups submitted proposed 61-seat redistricting plans to LATFOR.

In mid-February 2002, LATFOR's co-chairmen released a Senate redistricting proposal that had been developed by the Republican Senate Majority, announcing for the first time the plan to increase the size of the Senate from 61 seats to 62. The record contains evidence demonstrating that the Senate Majority actually made the decision to increase the size of the Senate in October 2001, four months before the public announcement. Because of this delay, all of the 61-seat plans submitted by the public were rendered obsolete. The Legislature enacted the Senate Majority's redistricting proposal

(with minor adjustments) in April 2002.

On its face, the 2002 Senate Plan systematically discriminates against residents of New York's downstate region (a contiguous cluster of 29 districts comprising New York City and its northern suburbs) and in favor of residents of the upstate region (a contiguous cluster of 24 districts running from northern Westchester County to the north and west). Every single downstate district is substantially overpopulated, and every single upstate district is substantially underpopulated, with a total population deviation of 9.78%. The map reproduced below, which depicts underpopulated districts in red and overpopulated districts in green,[1] demonstrates the Plan's consistent and methodical regional bias:

[1] The nine Long Island districts are shown in white, because the population of each is within five one-hundredths of one percent (0.0005) of the ideal district size.


Maps 06a and 06b: District Deviations from Ideal Population
2002 Senate Plan
a) New York State
b) Downstate & Long Island Detail
2002 Senate Districts
% Deviation
-4% to -8%
-2% to -4%
-0.05% to -2%
-0.05% to 0.05%
0.05% to 2%
2% to 4%
4% to 8%
0 40 80 120
Miles
0 20 40 60
Miles

(J.S. 272a-273a).[2]

It is undisputed that the Legislature easily could have drawn a plan with far lower population deviations and with greater adherence to the other redistricting requirements of the New York Constitution, *see* N.Y. CONST. art. III, § 4, including compactness and county integrity. (J.S. 259a-263a, 271a). These facts, coupled with the fact that the total population deviation comes within a whisper of the ten percent threshold of presumptive unconstitutionality, give rise to a strong inference that the Legislature did not engage in the requisite "honest and good faith effort" to achieve population equality. Rather, the objective characteristics of the Plan indicate that the Legislature deliberately refrained from shifting a Senate district from the upstate region to the downstate region—notwithstanding the population shifts documented in the 2000 Census—opting instead to preserve the number of upstate districts, and to manipulate district lines just enough to bring the total population deviation below ten percent. Because of this powerful circumstantial evidence of bad faith, Plaintiffs amended their complaint to challenge the constitutionality of the 2002 Senate Plan.

Defendants removed the state court action to the district court, where it was consolidated with the pending federal action. Senator Joseph Bruno, the Senate Majority Leader, volunteered to serve as "lead defendant" on behalf of all Defendants. Defendants then moved to dismiss, arguing (i) that a redistricting plan with a total population deviation below ten percent is *per se* exempt from a population equality challenge, and (ii) that claims of regional population discrimination are not cognizable as a matter of law. The district court denied Defendants' motion.

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[2] The average overpopulation of the 29 downstate districts is 2.37%. This excess population would constitute 68.80% of a district. The average underpopulation of the 24 upstate districts is 2.86%, which amounts cumulatively to 68.57% of a district. The Plan thus cheats the downstate region of approximately seven-tenths of a district. (J.S. 250a-251a, 256a-257a, 270a).

Defendants resisted participating in document discovery (beyond the production of documents that were already in the public domain). The Majority Leader asserted "legislative privilege," which he claimed insulates legislators and their staffs from the obligation to disclose documents or provide other discovery revealing how and why the Senate district lines were drawn. The discovery dispute was referred to a magistrate judge, who rejected the Majority Leader's assertion of an absolute legislative privilege, but largely ruled in his favor on the basis of a qualified privilege akin to the deliberative process privilege that can apply to Executive Branch officials. (J.S. 187a-205a). The magistrate judge held that Plaintiffs had, for the most part, failed to demonstrate sufficient need for discovery to overcome the qualified privilege, but that Plaintiffs were entitled to discover a small number of documents that had already been shared with non-legislator members of LATFOR, *id.* 213a-215a – including four memoranda sent by Mark Burgeson, the primary drafter of the Plan,[3] to the Senate Majority leadership. *Id.* 274a-282a. The district court affirmed these privilege rulings. *Id.* 206a-209a, 228a-232a.

Despite the largely successful assertion of privilege, the few memoranda that Defendants were compelled to produce provide powerful direct evidence of what is objectively obvious on the face of the Plan: that its drafters purposefully preserved the old upstate Senate districts – notwithstanding the contrary 2000 Census data – in a deliberate scheme to achieve as much regional and partisan advantage as possible without causing the total population deviation to cross what they perceived to be a constitutionally dispositive ten percent threshold.

The evidence demonstrated that the drafters of the 2002

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[3] Burgeson served as special assistant to Senator Dean Skelos, the Republican Senate Majority co-chairman of LATFOR. Burgeson developed the 2002 Senate Plan in close consultation with the Majority Leader, with Senator Skelos (who was appointed to LATFOR by the Majority Leader), with Steven Boggess (the Secretary of the Senate, who is the Majority Leader's chief aide), and with Vincent Bruy (a non-legislator who also was appointed to LATFOR by the Majority Leader).

Senate Plan began the redistricting process based upon this immutable premise: that the number of districts in the areas west of the Hudson River and north of Albany would remain unchanged at 23. (J.S. 274a).[4] In a memorandum to Senator Skelos and Secretary Boggess, Burgeson explained that he had intentionally drawn these upstate districts "light" (*i.e.*, underpopulated) for the express purpose of "avoid[ing] migration downstate" (*i.e.*, to prevent a shift in the allocation of a district from the upstate region to the downstate region). *Id.* 279a. During his deposition, Burgeson admitted that this memorandum was intended to convey his intent to "maintain[] the current representation upstate as it was." *Id.* 287a.

Given the premise that the upstate districts would be intentionally underpopulated, the issue became how to draw the remaining portion of the State: the area east of the Hudson River, stretching from Columbia County (just southeast of Albany) south through the Hudson Valley and New York City to the Queens-Nassau border. *Id.* 274a, 277a-278a, 281a-282a.

In dividing up this remaining redistricting zone, the drafters took advantage of an opportunity to underpopulate two additional upstate districts (beyond the upstate districts that had already been drawn "light"). Through what he boasted was a "manipulation of town combinations," Burgeson "was able to take advantage of" New York's so-called "town on border" rule to draw Districts 41 and 40 "a little bit 'lite' [sic] at 301,541 and 303,359 respectively."[5] *Id.* 282a. As a result of that purposeful "manipulation," these two additional upstate districts were deliberately underpopulated, and the remaining

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[4] The drafters also recognized that the Long Island region (comprising Nassau and Suffolk Counties), which had grown at a rate almost exactly the same as the statewide average, naturally stood to retain its previous nine Senate districts – all of which were (and are) held by Republican incumbents.

[5] Article III, section 4 of the New York Constitution provides that where two Senate districts adjoin within a county, their populations may not differ by more than the population of the least populous town on the district boundary. This is the so-called "town-on-border rule" that Burgeson "t[ook] advantage of."

districts were even further overpopulated. *Id.* 282a.

The drafters of the Plan then turned their attention to bolstering a Republican district in the Bronx that had become vulnerable because, between 1990 and 2000, substantial numbers of minority voters had moved in and substantial numbers of white voters had moved out. The drafters schemed to transfer as much population as possible from overwhelmingly white southern Westchester into this Bronx district.[6] They evaluated which of several possible "combination of counties" would best effectuate this partisan goal, concluding that leaving Queens County "intact"—*i.e.*, drawing districts entirely within the County without crossing its border—would yield the largest possible number of Westchester residents that could be connected to the Bronx.[7] *Id.* 277a-278a, 281a-282a. The direct result of this partisan gambit was that population deviations increased markedly: Had Kings County (Brooklyn) been kept intact, each of its districts would have been only 0.68% above the statewide mean, compared with 4.05% for each of the Queens County districts that were created. *Id.* 275a. The decision about which county to keep intact—and not to keep both intact—was based entirely on the goal of maximizing partisan advantage in the Bronx. No consideration was given to minimizing population inequality, nor was preserving counties considered an end in itself.

The drafters realized they had a big problem in apportioning the remaining districts. The remaining area had an aggregate population of 6,536,447. If that population were divided among 20 districts (as part of a 61-seat Senate), the average population in each of those districts would be 326,822.

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[6] Burgeson wrote that one of the main "parameters" in redistricting the remaining area of the State was to "determin[e]" how to "result[] in the greatest population in Westchester connecting to Bronx." (J.S. 277a). *See also id.* 282a (stating that the redistricting "method" was to "maximiz[e] the Westchester total" that would be "connected to Bronx").

[7] One of Burgeson's memoranda is entitled "The 135"—a reference to the 135,033 Westchester residents that proved to be the maximum number that could be connected to the Bronx. (J.S. 281a-282a).

Because the least populous district in the 2002 Senate Plan has a population of 290,925, the result would have been a total deviation of 11.54% of the mean for a 61-seat Senate—well above the ten percent threshold that the Plan's drafters studiously sought to avoid. They therefore increased the size of the Senate from 61 districts to 62. The resulting Plan has a total deviation of 9.78%, just a hair under the ten percent threshold they considered to be a safe harbor.[8]

Once the drafters identified a way to reduce the total deviation to just below ten percent, they simply stopped, making no further effort to reduce population deviations. Their goal was merely "to craft districts whose population falls within the acceptable overall deviation of 10%." (J.S. 282a). Indeed, Burgeson testified candidly that he assumed that any total deviation up to ten percent is constitutionally acceptable. *Id.* 284a, 286a. Other than staying within ten percent, the drafters paid no attention to the notion that population deviations should be minimized, if not avoided altogether.

Despite this formidable record of deliberate regional bias and indifference to population equality, Defendants moved for summary judgment. Consistent with their assertion of legislative privilege, Defendants did not proffer a shred of evidence—not a single document, nor a single word of testimony from any witness—regarding the *actual* reasons why the Plan contains a systematic pattern of regional discrimination with a total population deviation approaching ten percent. Defendants relied instead on what they characterized as an "objective" analysis of the redistricting goals they claimed the Plan *appears* to serve on its face,

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[8] The drafters of the Plan also considered what regional and partisan advantage could be gained by further increasing the size of the Senate to 63 seats. They concluded, however, that increasing the Senate to 63 seats would not afford the Republicans "the opportunity to pick up a district," because all of the upstate Republican districts had already been drawn as "light" as possible. (J.S. 279a-280a). For this reason, "[a]dding another district anywhere upstate would exacerbate that situation" - that is, the upstate districts could not be made any "lighter" without pushing total population deviations over ten percent. *Id.*

including a putative "expert" report on that subject by none other than Burgeson himself. Although Burgeson purported to opine on the purposes the Plan *seems* to serve, Defendants nonetheless would not allow Burgeson to be cross-examined about whether his "objective" presentation was consistent with the redistricting goals that he and the other drafters of the Plan *actually* pursued. The magistrate judge ruled, and the district court affirmed, that Defendants' reliance on Burgeson's "expert" report did not open the door to discovery of his personal experience as chief architect of the Plan. (J.S. 220a-221a, 231a-232a).

Plaintiffs opposed summary judgment not only by relying on the copious evidence of purposeful population discrimination discussed above, but also by pointing to evidence confirming that each of the three "legitimate" reasons that Defendants offered for the Plan's population deviations was pretextual.

First, Defendants claimed that the population deviations contained in the Plan were necessary to preserve county borders, especially the Queens County border. Uncontradicted evidence confirmed, however, that Defendants easily could have drawn a plan that divided far fewer counties with significantly lower population deviations. The record leaves no doubt, moreover, that the Plan's drafters preserved the Queens County border not to further any lofty ideal that counties should be kept intact, but rather because that option enabled them to shift more white population from Westchester County into a vulnerable Republican district in the Bronx than any other "combination of counties" they considered.

Defendants also claimed that the population deviations contained in the Plan resulted from a policy of avoiding incumbent pairings. That too is false. Although the Plan pairs no upstate or Republican incumbents, the Plan's drafters bent over backward to pair two sets of downstate Democratic incumbents, conspicuously leaving nearby open seats in both instances.

Finally, Defendants claimed that the population deviations contained in the Plan were necessary to preserve existing districts. The evidence demonstrates, however, that the drafters of the Plan were interested in preserving *upstate* but not downstate districts, notwithstanding the Census data that they were well aware dictated otherwise.

The district court nevertheless granted Defendants' motion for summary judgment. The court held that because the total deviation is below ten percent, Plaintiffs can prevail only by demonstrating that the deviations resulted "solely" from the pursuit of improper redistricting goals. (J.S. 24a, 25a-26a). Viewing the record in the light most favorable to Defendants—contrary to elementary principles of summary judgment practice—the court credited Defendants' "objective" claim that the drafters of the Plan were motivated, at least in part, by "permissible" redistricting considerations. *Id.* 28a-30a. Noting that 21 of the 24 upstate incumbents were Republicans, *id.* 30a, the court found that the Plan's pattern of discrimination was motivated at least in part by partisanship, as well as by the desire to preserve prior districts and avoid incumbent pairs, and concluded accordingly that Plaintiffs could not meet the "solely" standard as a matter of law. The court refrained from addressing (much less crediting) any of the copious evidence of purposeful regional discrimination discussed at length above.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The District Court Erred in Concluding That Plaintiffs Failed to Demonstrate Unconstitutional Population Discrimination

A. The Record Contains Overwhelming Evidence of Purposeful Regional Discrimination

It is axiomatic that the Equal Protection Clause forbids a State from drawing legislative districts that deviate from population equality in a manner that favors the residents of one geographic region in the State over another:

> [T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to . . . place of residence within a State.

Reynolds, 377 U.S. at 560-61; *see also Abate v. Mundt*, 403 U.S. 182, 185-86 (1971) ("underscor[ing]" the "danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests"); *Hadley v. Junior College Dist. of Metropolitan Kansas City*, 397 U.S. 50, 57 (1970) (striking down voting scheme that resulted in "a systematic discrimination against voters in the more populous school districts"); *Wells v. Rockefeller*, 394 U.S. 542, 546 (1969) ("To accept a scheme such as New York's would permit groups of districts with defined interest orientations to be overrepresented at the expense of districts with different interest orientations."); *WMCA, Inc. v. Lomenzo*, 377 U.S. 633, 653-54 (1964) (striking down a plan containing "a built-in bias against voters living in the State's more populous counties").[9]

Although State legislatures are afforded a modicum of discretion to pursue certain traditional redistricting objectives other than population equality, this Court has never wavered from the bedrock constitutional imperative that districting plans must be "free from any taint of arbitrariness or discrimination." *Roman*, 377 U.S. at 710. Those cases that have acknowledged the limited discretion of States to pursue other legitimate redistricting objectives have also taken pains to emphasize that, in order to withstand constitutional scrutiny, such policies must be consistently and neutrally applied. *Brown*, 462 U.S. at 843, 845-46; *Karcher*, 462 U.S. at 740.

The uncontradicted evidence confirms that the drafters of the 2002 Senate Plan did not make the required "honest and good faith effort" to achieve population equality. The Plan

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[9] *See also Larios v. Cox*, 300 F. Supp. 2d 1320, 1342-47 (N.D. Ga.), *aff'd*, 124 S. Ct. 2806 (2004); *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051-52 (S.D. Ill. 2001); *Roxbury Taxpayers Alliance v. Delaware County Bd. of Supervisors*, 886 F. Supp. 242, 254 (N.D.N.Y. 1995); *Licht v. Quattrocchi*, 449 A.2d 887 (R.I. 1982).

contains a clear and consistent pattern of discrimination that methodically favors the upstate region of the State over the downstate region. Moreover, Plaintiffs have adduced abundant evidence confirming beyond dispute that the Plan resulted from a deliberate scheme to maintain the existing, outdated level of representation of the predominantly rural, Republican, white upstate region at the expense of the largely urban, Democratic, minority downstate region, and to otherwise exact as much partisan advantage from the redistricting process as possible without causing the total deviation to cross what the drafters perceived to be a constitutionally dispositive ten percent threshold.

This is not a case in which the drafters of a plan inadvertently or incidentally created substantial population deviations and then failed to take adequate steps to reduce or eliminate them. Here, it was the drafters' *conscious purpose* to draw districts with substantial population deviations. The record is clear that they intentionally drew the upstate districts "light" in blatant disregard of Census data that they knew required the "migration" of a district from upstate to downstate. They resorted to the deliberate "manipulation" of New York's town-on-border rule in order to maximize the number of upstate districts that could be underpopulated. And they purposefully crafted a downstate configuration that maximized partisan advantage while keeping the total population deviation just under ten percent, even though they knew full well that the deviation could be substantially reduced through a variety of other configurations.

The district court's opinion barely mentioned these demonstrated motivations, much less did it view the evidence in the light most favorable to Plaintiffs. To the contrary, and in blatant disregard of the most fundamental rule of summary judgment practice, *see Hunt v. Cromartie*, 526 U.S. 541 (1999), the district court discounted Plaintiffs' evidence and credited Defendants' asserted justifications, concluding as a matter of law that the deviations resulted from "many permissible redistricting considerations." (J.S. 28a). That conclusion is

belied by the mountain of evidence discussed above, which the district court improperly ignored.

Instead of grappling with the copious evidence of purposeful regional discrimination, the district court suggested that Plaintiffs' definitions of the upstate and downstate regions are "self-serving and defective," dismissing those definitions as "tailored to suit [Plaintiffs'] litigation strategy." (J.S. 31a). Plaintiffs never contended, however, that there are any talismanic "definitions" of New York's upstate or downstate regions. Those terms were used only as a shorthand description of the geographic areas that *Defendants* deliberately chose to under- and overpopulate—as evidenced, for example, by Burgeson's statement, made long before this litigation was commenced, that the "upstate" districts had been underpopulated to avoid migration of a district "downstate." *Id.* 279a. The notion that a regional discrimination claim fails as a matter of law unless the bias happens to coincide perfectly with pre-existing "generally accepted" definitions of the affected regions is absurd—especially here, where the record contains uncontradicted evidence demonstrating that any number of possible variants on the definition of "downstate" would change the arithmetic of the malapportionment very little (if, for example, Rockland County were excluded) or not at all (if Long Island were included). *Id.* 251a-252a & n.1.[10]

The district court also found that the evidence adduced by Plaintiffs failed to account for the "reality" that on the basis of citizen voting age population ("CVAP"), the downstate region could be characterized as overrepresented. (J.S. 32a-33a). But the Legislature reapportioned on the basis of *total* population, as the New York Constitution expressly requires, *see* N.Y. CONST. art. III, § 5-a, not on the basis of CVAP. And as the district court recognized, a State's choice to redistrict based on total population is constitutionally valid. *See Garza v. County of Los Angeles*, 918 F.2d 763, 774-76 (9th Cir. 1990); *Daly v. Hunt*, 93

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[10] *Larios* found unconstitutional regional discrimination notwithstanding the fact that "the various witnesses had different ways of defining the boundary between north and south Georgia." 300 F. Supp. 2d at 1323 n.1.

F.3d 1212, 1223-27 (4th Cir. 1996); *Chen v. City of Houston*, 206 F.3d 502, 523-28 (5th Cir. 2000). The Equal Protection Clause, after all, protects "persons," not merely voting age citizens.[11]

B. The District Court Applied the Wrong Legal Standard

The district court held that Plaintiffs must demonstrate that the population deviations in the 2002 Senate Plan resulted "*solely* from the promotion of an unconstitutional or irrational state policy." (J.S. 24a-25a) (emphasis in original). According to the district court, in other words, identifying *any* ostensibly legitimate purpose that the Plan may serve defeats Plaintiffs' claim as a matter of law, even if the Legislature was motivated *primarily* by illegitimate purposes.

The district court's "sole purpose" test cannot be reconciled with *Roman v. Sincock*, which plainly condemns any population deviations created *even in part* for illegitimate purposes—*i.e.*, with "*any taint* of arbitrariness or discrimination." 377 U.S. at 710 (emphasis supplied); *see also Daly v. Hunt*, 93 F.3d 1212, 1220 (4th Cir. 1996) (holding that to prevail on a population equality claim where the total deviation is less than ten percent, a plaintiff must only produce "further evidence," in addition to population deviation statistics alone, "to show that the apportionment process had a 'taint of arbitrariness or discrimination' ") (quoting *Roman*).[12]

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[11] The district court also suggested that New York City "controls" a number of districts that is roughly proportional to its share of the State's population. (J.S. 31a-32a). In divining the number of districts ostensibly "controlled" by New York City, the court included two districts that are only *partially* within the City. Not only does the record contain no evidence whatsoever that New York City "controls" either of these partial districts, but the drafters of the Plan purposefully siphoned 135,000 residents from Westchester ("The 135") in order to *prevent* City voters from controlling one of the partial districts. (J.S. 277a, 281a-282a).

[12] The case cited by the district court as establishing the "solely" standard, *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022 (D. Md.1994), plainly did not survive the Fourth Circuit's subsequent decision in

Moreover, the "sole purpose" standard is, as a practical matter, virtually impossible to meet. Redistricting is an enormously complicated process, involving many different interests and players. While it is often possible to divine the *principal* reasons why a plan was drawn in a given manner, one can never know *all* of the myriad factors that went into the mix.

Sophisticated redistricters who are intent on manipulating population deviation for illegitimate purposes will *always* be able to pay lip service to various traditional redistricting objectives, for even the most gerrymandered and blatantly discriminatory plans take *some* account of such traditional redistricting considerations as compactness and contiguity. Inevitably, imposing a "sole purpose" test where deviations are below ten percent is the functional equivalent of holding that ten percent is a safe harbor. The standard imposed by the district court is therefore directly at odds with this Court's affirmance in *Larios*, which unambiguously rejected the invitation to create a buffer zone within which redistricting plans are immune from population equality scrutiny.[13]

Daly. In any event, the result in *Marylanders* did not depend on the ultra-stringent "solely" formulation, for the court held that the plaintiffs had offered no evidence that the alleged illegitimate purpose—overrepresenting the City of Baltimore—played *any* role in causing the challenged population deviations. *See* 849 F. Supp. at 1036.

[13] The "solely" standard also would sanction, as the district court expressly did, the conscious decision by the Plan's drafters to make *no effort whatsoever*—much less the constitutionally requisite "honest and good faith effort"—to reduce or eliminate population deviations once the total deviation dipped just below ten percent. (J.S. 27a) (recognizing that the drafters merely sought to stay within ten percent, but holding that "[n]o invidious purpose can be inferred from such conduct alone"). This Court has repeatedly warned about precisely this scenario. *See Karcher*, 462 U.S. at 731 ("If state legislators knew that a certain *de minimis* level of population differences were acceptable, they would doubtless strive to achieve that level rather than equality."); *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("[T]o consider a certain range of variances de minimis would encourage legislators to strive for the range rather than for equality as nearly as practicable."); *see also Vigo County Republican Central Committee v. Vigo County Commissioners*, 834 F. Supp. 1080, 1085-86 (S.D. Ind. 1993) (striking down a plan the "impetus" of which was

The district court also suggested that any lesser standard would open the floodgates to claims based on "scant evidence of ill will." (J.S. 25a). But experience from those jurisdictions that do not apply the "solely" standard demonstrates that challenges to plans with deviations below ten percent are exceedingly rare, and that a more measured standard can be applied without inviting baseless litigation. In any event, the evidence of purposeful discrimination in this case is anything but "scant." Applying a "solely" test to the facts presented here would mean that the Legislature may, with impunity, deliberately and gratuitously deviate from population equality for the purpose of gaining regional or partisan advantage, so long as it can be said that the scheme also happens, to some extent, to promote other legitimate interests that do not conflict with the primary invidious objectives.

C. The Desire to Maximize Partisan Advantage Is Not a Legitimate Basis for Deviating From Population Equality

The district court's opinion was premised on the assumption that so long as the total population deviation remains within ten percent, it is permissible for a legislature to deliberately construct districts of unequal size for the purpose of gaining partisan advantage. (J.S. 2a, 4a, 30a). This was error.

Where a plan has a total population deviation over ten percent—and thus is presumptively unconstitutional, *see Voinovich v. Quilter*, 507 U.S. 146, 161 (1993)—it unquestionably would be insufficient for a legislature to defend the deviation by asserting that it served partisan purposes. Given that partisan politics is not a legitimate reason for deviating from population equality in a plan with a total deviation above ten percent, it follows that it cannot be a legitimate reason for

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"simply to move precincts between districts until the population deviation was less than 10% and then stop, despite the fact that it was possible to achieve districts with a significantly lower population deviation").

deviating under ten percent. A State has no legitimate interest in the entrenchment of whatever political party happens to control the redistricting process.

The district court's suggestion that Plaintiffs have the burden of proving the existence of geographic animus independent of partisanship is mistaken in two ways. First, the Court fundamentally misconceived the nature of the partisanship issue presented here, which it conflated with the very different issue presented in *Easley v. Cromartie*, 532 U.S. 234 (2001). Here, the issue is not whether partisanship *negates* the impermissible motive, but rather whether partisanship *justifies* the purposeful departure from population equality. Because Defendants' reliance on politics as an excuse does nothing to change the fact that they plainly engaged in purposeful regional population discrimination, the partisanship issue cannot rescue them. *See Garza v. County of Los Angeles*, 918 F.2d 763, 778 n.1 (9th Cir. 1990) (Kozinski, J. concurring) (discussing the difference between animus and intent to discriminate).

Second, the district court treated partisanship as an affirmatively legitimate ground for deliberately deviating from population equality—the implication being that it would be perfectly acceptable for the Legislature to intentionally draw districts with a 9.99% deviation so long as doing so would elect more Republicans than if the districts were drawn equally. But *Larios* condemned a plan with a deviation under ten percent precisely because the malapportionment resulted from the pursuit of partisan advantage. Indeed, this Court's decision in *Vieth v. Jubelirer*, 124 S. Ct. 1769 (2004)—far from suggesting that a legislature may purposefully manipulate district population levels for political gain—confirmed that partisan gerrymandering is illegitimate. The issue presented in *Vieth* was not whether partisanship is an acceptable aspect of redistricting, but rather whether there are *remedies* for partisan

gerrymandering that are judicially manageable.[14]

As two Justices of this Court recently explained in *Larios*, after *Vieth*, "the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength." 124 S. Ct. at 2808 (Stevens, J., concurring). *Larios* thus confirms that although partisanship may be a fact of life, it is not a legitimate excuse for purposely injecting population deviations into a redistricting plan.

D. None of the Justifications Proffered by Defendants Is Legitimate

Defendants' principal justification for the deviations in the Plan was that they were necessary to preserve county borders, especially the Queens County border. Indisputable evidence confirmed, however, that fewer county lines could have been split with lower deviations, *see Kilgarlin v. Hill*, 386 U.S. 120, 123 (1967) (rejecting deviations where other plans presented to the court respected county lines but produced substantially smaller deviations), and that the only reason the drafters preserved the Queens County border was that it enabled them to shift as much white population as possible into a vulnerable Republican Bronx district. Tellingly, the district court did not rely upon or even mention this explanation, which was transparently pretextual.

The district court did credit Defendants' claim that the deviations were necessary to avoid incumbent pairings. (J.S.

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[14] *See* 124 S. Ct. at 1785 (plurality opinion of Scalia, J.) (accepting that "partisan gerrymanders [are incompatible] with democratic principles" and that an "*excessive* injection of politics [into redistricting] is *un*lawful"); *id.* at 1798 (Kennedy, J., concurring) ("I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible."); *id.* at 1808 (Stevens, J., dissenting) (when "political considerations . . . disadvantage members of a [political] minority," they "must rest on a neutral predicate"); *id.* at 1816 (Souter, J., dissenting) ("[T]he increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine.").

3a, 28a, 34a). The evidence was uncontradicted, however, that the drafters sought only to avoid pairing upstate or Republican incumbents, and that two sets of downstate Democratic incumbents were gratuitously paired. *See Larios*, 300 F. Supp. 2d at 1347 (any "policy of protecting incumbents" must be "applied in a consistent and neutral way").[15] Coupled with the copious affirmative evidence of a deliberately discriminatory scheme, this pretext evidence makes it even more clear that the district court erred in granting Defendants judgment as a matter of law. *See Abate*, 403 U.S. at 185 (courts must "carefully scrutinize[] state interests offered to justify deviations from population equality"); *Karcher*, 462 U.S. at 741 ("The State must . . . show with some specificity that a particular objective *required* the specific [population] deviations in its plan.") (emphasis supplied).

The district court also credited Defendants' claim that the deviations were necessary to preserve existing districts, but failed to consider whether such an asserted interest in preserving the status quo can be a legitimate justification for a deliberate effort to nullify Census data, particularly on such a broad scale as in this case. The whole point of redistricting following the Census, after all, is to reflect actual population shifts during the preceding decade. Indeed, *Reynolds* condemned the failure to redistrict precisely because that failure perfectly preserved existing districts despite population shifts. Avoiding the consequences of the Census plainly is not a legitimate basis for purposefully deviating from population equality—especially in New York, where preserving prior

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[15] This Court has acknowledged, in the context of *congressional* redistricting, that States may have a legitimate interest in avoiding incumbent pairings because the effect of the prevailing seniority system in Congress is that repeated reelections lead to positions of greater responsibility and power and, in turn, greater ability to be of use to the State in its relations with the federal government. *See Karcher*, 462 U.S. at 740 (1983). But that reasoning does not apply to State legislatures. Although incumbents themselves no doubt have strong interests in self-preservation, it is not at all obvious what legitimate *state* interest is served even by a neutral, evenhanded policy of incumbent protection.

districts is not one of the several redistricting criteria prescribed in the State Constitution. *See* N.Y. CONST. art. III, § 4.[16]

II. The District Court Erred in Sustaining the Majority Leader's Assertion of "Legislative Privilege"

Not only did the district court hold Plaintiffs to an exaggerated burden of proof, but it denied them nearly all opportunity to obtain evidence bearing directly on the central constitutional inquiry: whether the Plan reflects an "honest and good faith effort" to achieve population equality. Instead, the court sustained the magistrate judge's rulings (i) that the Majority Leader was entitled to a qualified privilege along the lines of the deliberative process privilege available to Executive Branch officials; (ii) that neither the Majority Leader's active participation in the litigation, nor his decision to call Burgeson as his "expert" witness, affected his entitlement to invoke the privilege; and (iii) that Plaintiffs' pressing need for discovery did not outweigh Defendants' asserted need for secrecy.

At the outset, this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), casts substantial doubt on whether there is any "legislative privilege" of the sort recognized below. *Gillock* involved an assertion of legislative privilege in federal court by a Tennessee legislator. Although the legislator would have enjoyed a strong legislative privilege under the Tennessee Constitution had he been litigating in state court, this Court held that assertions of legislative privilege in federal court are to be evaluated not under state law, but rather under Rule 501 of the Federal Rules of Evidence, which requires courts to apply federal common law "in light of reason and experience." *Id.* at

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[16] Nor is there any tradition in New York of preserving districts where a region's share of the state population is declining. New York City's share of the state population declined sharply during the 1960s and 1970s, but the subsequent Senate redistrictings in 1972 and 1982 adhered to the Census data and did not depart from population equality to preserve the City's previously apportioned districts. (J.S. 237a-239a).

386.[17] Observing that affording a privilege to State legislators in federal court is neither "indelibly ensconced in our common law" nor "an imperative of federalism," *id.*, the Court held that no such privilege exists, characterizing as "minimal" the "impact" its holding would have "on the exercise of [the] legislative function." *Id.* at 373; *see also In re Grand Jury*, 821 F.2d 946 (3rd Cir. 1987) (applying *Gillock* and holding that State legislators have no legislative privilege in federal court); *Florida Assn. of Rehabilitation Facilities v. Florida Dept. of Health and Rehabilitative Svcs.*, 164 F.R.D. 257 (N.D. Fla. 1995) (same).[18]

Notwithstanding *Gillock*, the magistrate judge held, and the district court affirmed, that the Majority Leader enjoys some form of qualified "legislative privilege"—one that, like the deliberative process privilege available to members of the Executive Branch, required balancing the extent to which disclosure could chill legislative deliberations against Plaintiffs' need to discover the information sought. (J.S. 198a-199a). Rather than actually performing such a balancing analysis, however, the court attached central significance to the fact that the 2002 Senate Plan had been developed in part within LATFOR—a body that includes non-legislators. Because "the fact that LATFOR was constituted in this fashion tends to weaken any claim" that disclosure of its deliberations to non-legislators would be problematic, *id.* 200a, the magistrate judge allowed discovery of documents concerning the "operations" of LATFOR, but shielded the Majority Leader from disclosing any documents that were generated "outside" of LATFOR. *Id.* 202a, 204a-205a. As a practical matter, the Majority Leader was ordered to produce only a small fraction of the contested documents.

There can be no doubt that any appropriate balancing of

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[17] The Speech or Debate Clause of the United States Constitution is inapplicable because it only protects members of Congress, not State legislators. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404 (1979).

[18] "Testimonial exclusionary rules and privileges" are disfavored because they "contravene the fundamental principle that 'the public . . . has a right to every man's evidence.'" *Trammel v. United States*, 445 U.S. 40, 50 (1980).

the parties' competing interests would have supported disclosure of the information Plaintiffs sought. The Majority Leader's asserted need to legislate in secret is contradicted by the New York Constitution, which generally requires that the "doors of each house" of its Legislature "shall be kept open." N.Y. CONST. art. III, § 10. The information sought by Plaintiffs, on the other hand, was central to determining a constitutional question of paramount public importance: whether the Legislature discharged its duty to make an "honest and good faith effort" to construct districts of equal population. *See Rogers v. Lodge*, 458 U.S. 613, 618 (1982) (stating, with respect to constitutional claim of minority vote dilution, that "determining the existence of a discriminatory purpose demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available") (internal quotation omitted); *Arlington Heights v. Metropolitan Development Corp.*, 429 U.S. 252, 268 (1977) ("contemporary statements by members of the decisionmaking body" are highly relevant to the question whether the body acted with discriminatory animus). Indeed, legislators and members of their staffs routinely testify in redistricting matters regarding legislative acts and statements designed to show the presence or absence of discriminatory motive. *See Larios*, 300 F. Supp. 2d at 1325-34; *Georgia v. Ashcroft*, 539 U.S. 461, 123 S. Ct. 2498, 2516 (2003); *Easley*, 532 U.S. at 254; *Shaw v. Hunt*, 517 U.S. 899, 906 (1996); *Miller v. Johnson*, 515 U.S. 900, 917-18 (1995).

In this case, moreover, the Senate Majority Leader waived any immunity that might otherwise have applied when he removed this lawsuit from state court to federal court. *See Lapides v. Bd. of Regents of the Univ. System of Georgia*, 535 U.S. 613 (2002). Not only did the Majority Leader choose not to assert immunity under *Tenney v. Brandhove*, 341 U.S. 367 (1951), but he affirmatively assumed control over the defense of the litigation by voluntarily asserting himself as "lead defendant." Indeed, the Majority Leader even expressly refused Plaintiffs' formal offer to dismiss him from the case with prejudice. We are aware of no case in which any court has ever sustained a

claim of "legislative privilege" where the legislator willingly participated in the litigation rather than asserting immunity. As the Third Circuit recently explained:

> [T]he Legislative Leaders [are not] seeking any kind of wholesale protection from the burden of defending themselves. Instead, the Legislative Leaders build from scratch a privilege which would allow them to continue to actively participate in this litigation . . . yet allow them to refuse to comply with . . . every adverse order. . . . [T]he privilege they propose would enable them to seek discovery, but not respond to it; take depositions, but not be deposed; and testify at trial, but not be cross-examined. In short, they assert a privilege that does not exist. . . . Moreover, every case which they do cite to support this privilege features, in direct contrast to this case, a defendant or target of a subpoena seeking to extricate himself or herself *completely* from various legal entanglements.

Powell v. Ridge, 247 F.3d 520, 525 (3rd Cir. 2001) (emphasis in original). The fact that the Majority Leader made the affirmative choice to participate in this litigation—despite the legislative immunity he could have asserted—extinguishes any privilege that otherwise might have applied.

Finally, and at a bare minimum, the Majority Leader waived legislative privilege by offering Burgeson, the chief architect of the 2002 Senate Plan, as a putative "expert" witness. Instead of proffering any evidence of the *actual* reasons why the Plan contains substantial population deviations, Defendants relied exclusively on Burgeson's "expert" report, which they characterized as an "objective" analysis of the allegedly legitimate redistricting goals they claim the Plan *appeared* to serve. In other words, Defendants relied on the principal drafter of the Plan to offer a sanitized opinion about what the Plan *seems* to do on its face, but then refused to disclose information demonstrating whether his "objective" analysis comported with what he and the other drafters of the Plan

actually did. This was particularly problematic given that Burgeson's experience drafting this Plan and earlier New York Senate plans constituted his sole asserted qualification for providing an expert opinion.

Under Rule 26(b)(4)(B) of the Federal Rules of Civil Procedure, a "party may, through interrogatories or by deposition, *discover facts known* or opinions held by an expert who has been retained or specially employed by another party" (emphasis supplied). The Rules require disclosure of "facts known" by an expert for the simple reason that opinions are based on facts, and the extent and nature of the facts to which an expert is privy goes directly to the ability of that expert to opine in a particular subject area. It is for the same reason that Rule 26(a)(2)(B) requires disclosure, *inter alia*, of "all data or other information considered by the [expert] witness in forming the opinions." Defendants cannot credibly deny that Burgeson considered the "data" and "information" that constitutes his experience in personally drawing the 2002 Senate Plan when forming his opinion about the redistricting objectives the Plan supposedly appears on its face to serve. For all these reasons, the court should have permitted discovery relating to his experience actually drawing the Plan at issue.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court note probable jurisdiction.

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APPENDIX

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